APPENDIX A

EXCERPTS FROM THE STATUTE

(Act of the General Assembly of Pennsylvania, approved May 27, 1921, P. L. 1198 (Act No. 445); 52 Purdon's Statutes §661.)

AN ACT

Regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties.

Section 1. Be it enacted, &c., That it shall be unlawful for any owner, operator, director or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

. . . . . .

Section 7. Any owner, operator, lessor, lessee, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, who shall violate any provision of this act, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine of not more than five thousand dollars, or

undergo imprisonment for not more than one year, both or either, at the discretion of the court.

Section 8. The courts of common pleas shall have power to award injunction to restrain violations of this act.

Section 9. This act is intended as remedial legislation, designed to cure existing evils and abuses, and each and every provision thereof is intended to receive a liberal construction such as will best effectuate that purpose, and no provision is intended to receive a strict or limited construction.

Section 10. It is hereby declared that the provisions of this act are severable one from another, and if, for any reason, this act shall be judicially declared and determined to be unconstitutional so far as relate to one or more words, phrases, clauses, sentences, paragraphs, or section thereof, such judicial determination shall not affect any other provision of this act. It is hereby declared that the remaining provisions would have been enacted notwithstanding such judicial determination of the validity in any respect of one or more of the provisions of this act.

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ARGUMENT

This brief is filed on behalf of forty-one intervenors, all public bodies, listed in Appendix B, comprising twenty-one cities, townships and boroughs, and twenty school boards. All the intervenors are located in the southern region of the Pennsylvania anthracite coal fields, within the counties of Schuylkill and Northumberland. The issues presented in the instant case are of vital importance to the many thousands of inhabitants for whom intervenors speak: the outcome relates closely to their lives and safety as well as to the millions of dollars they have invested in public buildings, public works, improvements, and to their private property.

The purpose of this brief is to discuss the law, the legislation and some of the fundamental concepts underlying these, as well as the factual background which prompted the decisions and led to the legislation directed to relief of the peculiar problems of those who live side by side with the anthracite industry.

In the first phase of development of large scale anthracite mining the operators removed only that coal from the virgin veins which could be removed with the maximum safety and minimum cost. This was called first mining. The conflict between the mining industry and the members of the public who lived on the surface above mining operations came with "second mining". "Second mining" or residual mining generally covers all reëntries into once mined areas for the purpose of removing the coal left in place by those who first mined the vein.

Second mining, which includes the practice of pillar robbing (R. 126a), though less profitable than first mining, was commercially and financially feasible (R. 126a). However, as second mining operations approached the point where the profit motive conflicted

with sound mining practices, the latter gave way to the former.

The temptation was to remove more coal than was consistent with the rights and safety of the surface owners. The amount of coal which could be taken out, and the amount which must be left in place to afford proper surface support varied from one location to another (R. 151a). In the immediate area of the subsidence involved in the instant case little or no second mining could be carried on without surface subsidence owing to the heavy pitch of the veins of coal.[1]

The widespread alarm in this area over the increasing number of subsidences led to the submission of numerous bills in the Pennsylvania Legislature, some of which were passed and became law.[2] The culmination of these concerted efforts for legislative control of the mine cave evil was the Kohler Act of May 27, 1921, P. L. 1198 (52 PS §661). *See Appendix "A".*

In signing the Kohler Bill, Governor Sproul stated that it was designed to guard ". . . against future and present dangers incident to the industry . . .", and to make ". . . reparation of damage to public and private property, to communities and to the whole prospect of life there . . ."[3] The very conditions that

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[1] In the Indian Ridge Colliery under Shenandoah, 75% of the original coal has been left in place since 1908 to support the surface of Shenandoah (R. 151a, 232a).

[2] 1911. Act of March 24, 1911, P. L. 26 (53 PS §2651 Note).

1913. Act of June 27, 1913, P. L. 639 (held unconstitutional in *Com. v. Alden Coal Company, Appellant,* 251 Pa. 134 (1915)).

1913. Act of July 26, 1913, P. L. 1439 (53 PS §2651).

1915. Act of June 1, 1915, P. L. 721 (repealed May 11, 1921, P. L. 479, Sec. 5).

[3] Legislative Journal of January 18, 1921, page 34; *Mahon v. Penna. Coal Co.,* 274 Pa. 489, 497 (1922).

are the basis of the litigation involved here were the same as those that prompted the Kohler Act.

The plaintiffs, in the case at bar, are the Borough of Shenandoah and the School District of the Borough of Shenandoah. The Estate of Stephen Girard was and is the owner of adjoining coal-containing property known as Kehley's Run Colliery. It was contended by the Borough and School District of Shenandoah, the plaintiffs, that their losses were caused through a subsidence resulting from the failure of support of Kehley's Run Mine; that the defendant Girard Estate was guilty of negligence in entering into a lease with the Morea Coal Company, under the circumstances involved; and, in permitting, directing and supervising these practices subsequent to execution of the lease. It was further contended that as a result of these wrongful acts, the surface area overlying the veins on the property of defendant was caused to subside and the lateral support of plaintiffs' property thereby removed. School buildings were destroyed and damaged; highways, sewer lines, water mains and service lines were broken; tax revenues were lost due to the diminution of value of private property damaged by the subsidence.

Plaintiffs proved that prior to the execution of the lease in 1938, there were approximately 577,000 tons of recoverable coal in the Kehley's Run Mine (R. 321a). Between 1865 and 1940, 9,940,941.11 tons had been removed (R. 245a). During 1938, 1939 and 1940 only 160,000 tons were removed (R. 246a), so that when the lease was made 92.16 per cent of all the coal in the colliery had been removed (R. 389a). Plaintiffs proved that defendants entered this lease notwithstanding the fact that the limit of safe extraction of coal was 35 per cent to 40 per cent (R. 151a), and notwithstanding the fact that defendant's own mining engineer and agent reported in 1937 that the Kehley's

Run Mine was rapidly approaching exhaustion. This state of facts made the lease unconscionable.

By the terms of the lease, Morea Coal Company could not leave any workable coal in the mine unless enjoined by an order of Court and the penalty for leaving any such unmined coal was the payment of a royalty to defendant for the coal left in place. It is further to be pointed out, by the terms of the lease under the heading marked "Coal Left to Support Surface", Morea was compelled to leave no coal unmined for the purpose of affording vertical or lateral support to any easement or structure upon or adjacent to Kehley's Run Mine.[4] By the very terms of the lease, defendant retained control of the mining operations of its lessee.[5] Any lingering doubt that defendant was in the coal business and thus, though a charitable trust, amenable to the rule of *Winnemore v. Philadelphia*, 18 Pa. Superior Ct. 625 (1902), must be dispelled by the testimony of its own Mining Engineer, William P. Millington, who said that he ran defendant's mining business (R. 70a).

Pursuant to the terms of the lease, Morea entered the leasehold and commenced operations. Morea removed more than 160,000 tons of the coal. On Sunday,

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[4] Under Art. XVI, paragraph of Lease headed "Coal Left to Support Surface" recites in part: "The purpose and intent of this requirement is that the lessee shall leave no coal unmined for the purpose of affording vertical or lateral support to any easement or structure upon or adjacent to the demised premises, when such easement or structure shall not have a proven legal right to such support, . . ." (R. 696a).

[5] For incidents of lessor-lessee relationship, see Art. XIX, (R. 699a) lessor's right of entry; Art. IX, (R. 688a) payment of taxes of leased premises by lessor; Art. XXIV, (R. 701a) lessor's right of distraint; Art. XXV, (R. 702a) forfeitures for failure to pay rent; Art. XXIII, (R. 701a) prohibitions against lessee's transferring, assigning, mortgaging or subletting without written consent of lessor.

March 4, 1940, the subsidence began. It continued for several days, and the damages referred to, supra, followed. Plaintiffs proved that this subsidence was caused by the negligent mining of defendant and its lessee in entering and executing the explicit terms of this unconscionable lease. Causation was established by plaintiffs when they proved defendant made the lease at a time when 90 per cent of the coal had been removed from its mine. It was shown by competent expert testimony that, in view of the nature, formation and pitch of the veins of coal in the area and the type of overburden, about 35 per cent to 40 per cent of the original coal in place could be removed with safety, but that 60 per cent would have to remain in the ground. It was definitely established that there were only about 577,000 tons of coal left in place after removal of more than 10,000,000 tons in the 75 years from 1865 to 1940.[6] Despite the hazardous nature of the undertaking and defendant's knowledge of all these facts (R. 145a), nevertheless defendant drew a lease which required further coal mining at the site until all the removable coal was extracted. It was shown that the actual cracking and shifting which caused the nine-block area in Shenandoah to subside took place in Kehley's Run Mine and was caused by defendant's negligence. All plaintiffs' experts said the cause of the subsidence of the nine-block area in Shenandoah was the removal of pillars in Kehley's Run Mine (R. 82a, 139a, 227a, 230a). They testified that from their own personal observations made at the time of damage and from defendant's own maps of the workings (R. 78a, 193a), pillars were actually being removed at the location in defendant's mine which would cause the subsidence in Shenandoah (R. 230a, 83a). Uncontradicted and ex-

[6] Kehley's Run Mine covered 42 acres with 12,000 feet of tunnels. Morea's operation was mere gleaning (R. 294a, 382a).

pert testimony of plaintiffs' mining engineers showed that the cracking and subsidence which certainly must follow such removal would tend to occur at right angles to the vein, and since the vein sloped southward at an angle of 20 degrees the actual subsidence would take place, as it did, to the south of the land line of defendant's mine and under the built-up section of Shenandoah (R. 227a, 230a). The jury heard the many witnesses of each side. It properly rejected the rather fanciful testimony of defendant's experts who said the subsidence resulted from failure of support in the Indian Ridge Mine. Indian Ridge operations had terminated in 1908 and had left 75 per cent of the removable coal in place (R. 152a, 232a). There had been no failure of the Indian Ridge pillars in 40 years (R. 152a). The Court submitted three special questions in addition to the general one, and the jury found specially that the subsidence was caused by failure of support of Kehley's Run Mine; that defendant was negligent in entering the 1938 lease with Morea Coal Company; and that defendant was guilty of negligence in permitting Morea Coal Company to continue mining operations in Kehley's Run Mine (R. 599a). The verdict for the Borough was $431,418.57; for the School District, $430,721.54.

In subsequent proceedings, the Common Pleas Court entered judgment non obstante veredicto, and plaintiffs appealed.

Intervenors have a legally enforceable interest in these proceedings. Sustaining the verdict of the jury is of tremendous importance to them for the salutary effect it will have in discouraging the use and abuses in similar leases. A lease which requires the lessee to leave no coal unmined for the purpose of affording vertical or lateral support, and which requires lessee to keep removing coal unless legally enjoined from doing so, and conducting operations in a manner regardless of the rights of adjoining property owners, is a

bad lease when we contemplate the welfare of the entire anthracite community. The judgment and opinion of the lower court runs counter to the affected interests of intervenors, and for this reason we urge that its correctness be closely examined. The Court below should not have entered judgment non obstante veredicto.

Although there is no absolute easement or right to lateral support except for land in its natural condition, this rule has no application where the removal of lateral support has been attended by acts of malice, wantoness or negligence: *Home Brewing Co. v. Thomas Coal Co.*, 274 Pa. 56, 60 (1922). The lower court found great comfort in the Home Brewing Company decision apparently because it, too, involved the same Kehley's Run Mine and the claim of an adjoining owner to lateral support. The similarity of our case and the *Home Brewing Company Case*, supra, stops with the fact that the same mine is involved. The lower court failed to recognize the important differences. In the *Home Brewing Company Case*, supra, no allegation of negligence was made, and none proven. In the instant case negligence was alleged and abundantly proven. Another element absent in the *Home Brewing Company Case*, supra, but present in our case is the very practical consideration of relative values from the viewpoint of public policy. The effect of the injunction in the former case was to take out of the market 450,000 tons of removable coal of a value greatly exceeding the worth of plaintiff's property. By way of contrast, in the instant case, there were only some 500,000 tons of all coal left in a mine that was 92.16 per cent exhausted at the time of entering the lease. In all the 42 acres and some 12,000 feet of workings, the value of all the coal was trifling when compared with the damage to plaintiffs' property as evidenced by the $862,140.11 verdict. In reality the damage was far greater than reflected by the verdict

because the owners of the individual properties involved were not parties in this action.

Further examination of the lower court opinion shows a disposition to usurp the function of the jury. The court rejected plaintiffs' evidence and substituted its own judgment for that of the jury when it held not only that plaintiffs failed to prove their case, but that all the factual evidence tended to show defendant was not at fault. The act of April 22, 1905, P. L. 286, Sec. 1, April 9, 1925, P. L. 221, Sec. 1 (12 PS §681) was not designed to vest the court with the power to substitute its own judgment for that of the jury, nor to disturb the distinction between the province of the court and the jury. The court is bound to view all the evidence in a light most favorable to the prevailing party, and should not enter judgment n. o. v. where there is any evidence upon the record from which the jury could have found for the successful party. In *Hostetler v. Kniseley*, 322 Pa. 248, 249 (1936) the late Chief Justice Kephart said:

> ". . . Under the Act of April 22, 1905, P. L. 286, the court cannot enter judgment n. o. v. where the evidence is conflicting on a material fact, or where any other reason exists precluding a binding direction: *Dalmas v. Kemble*, 215 Pa. 410; *Schwarz v. Glenn*, 244 Pa. 519, 524. The court does not determine questions of fact based upon disputed evidence; it merely reviews the whole case on the record and does subsequently what it would have been proper to do under a request for a binding direction: *Bond v. P. R. R. Co.*, 218 Pa. 34; *Smith v. Standard Steel Car Co.*, 262 Pa. 550. Appellee must be given the benefit of every fact pertaining to the issues involved which may be reasonably deduced from the evidence: *Kish*

v. P. R. R., 309 Pa. 439, 446; *Conley v. Simmons*, 312 Pa. 249. . . ."

In this case, there was conflicting evidence both as to negligence and as to causation. In view of the jury's findings, the trial judge should have resolved these conflicts in favor of plaintiffs. His further gratuitous statement that he considered the verdict against the weight of the evidence again reveals his failure to grasp the basic distinction between his function and that of the jury. A new trial will not be granted on the ground that the verdict is against the weight of the evidence where the jury would be justified in finding for either party because it must choose between conflicting testimony on material questions.

With this concluding observation, the intervenors respectfully submit that the action of the court below should be set aside and judgment entered for the plaintiffs in accordance with the verdict of the jury.

Respectfully submitted,

FRANK A. GALLAGHER,
Of Counsel for Intervenors.

APPENDIX "A"

Any discussion of the Kohler Act would be vain without first determining its applicability to the facts of this case. Section 1 of the Kohler Act of May 27, 1921, P. L. 1198 (52 PS 661) provides as follows: "It shall be unlawful for any owner, operator, director, or general manager, superintendent, or other person in charge of, *or having supervision over*, any anthracite coal mine, or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of . . ." (Italics added.)

It is patently clear from the 1938 lease from Girard Estate to Morea Coal Company, Article XIX, lease page 27 (R. 699a), and its other provisions, the Defendant reserved to itself the right to direct and control the manner and methods employed in Morea's conduct of the actual mining operations. Its avowed intention to supervise the operations through its mining engineer and other officers brings it clearly within the italicized portion of section 1 of the Kohler Act.

The Kohler Act was designed to regulate the mining of anthracite coal. Elaborating the portion of section 1 of the Act cited above, it was made unlawful so to mine anthracite coal as to cause the caving-in, collapse, or subsidence of (a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations; (b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public; (c) Any track, roadbed, right-of-way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by

the Public Service Company Law; (d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed; (e) Any cemetery or public burial ground. Section 7 sets forth penalties for violation of the Act, and section 8 gives the courts of common pleas the power to award injunctions to restrain violations of the Act. It is further provided by section 9 that the act is intended to be remedial in nature ". . . designed to cure existing evils and abuses, and each and every provision thereof is intended to receive a liberal construction such as will best effectuate that purpose, and no provision is intended to receive a strict or limited construction." Section 10 states that all provisions of the Act are severable one from another.

In *Mahon v. Pennsylvania Coal Co.*, 274 Pa. 489 (1922), the legislation came before the Supreme Court of Pennsylvania for the first time and was held to be constitutional. Although this decision was reversed on appeal to the Supreme Court of the United States (*Pennsylvania Coal Co. v. Mahon*, 43 S. Ct. 158, 260 U. S. 393, 67 L. Ed. 322, 28 A. L. R. 1321 (1922)), this decision is not conclusive when applied to the facts of the instant case since the *Mahon* case is distinguishable on its facts. The facts of the *Mahon* case were specialized. Mahon and his wife sought to enjoin defendant coal company from mining coal under their house. The coal company had conveyed the surface to them but in express terms reserved the right to remove all the coal under them, and they took the premises with this risk and waived all claim for damages which might arise from mining out the coal. Consequently, the *Mahon* case involved the question of vertical support as compared with negligent removal of lateral support in the instant proceeding. The *Mahon* case was further limited in application because there existed privity of

contract as well as privity of estate between plaintiff and defendant. The majority opinion rejected the Act as destructive of valuable property and contract rights. Mr. Justice Brandeis, in a strong dissenting opinion, stated that the right of the owner to use his land is not absolute. He further stated that an owner may not so use his land as to create a public nuisance and that uses may become public nuisances with changing conditions although once harmless.

In the present proceeding, there is no question of the privity of contract or estate. Whereas the Supreme Court of Pennsylvania in the *Mahon* case was faced with the necessity of setting aside the contract rights of the plaintiff and defendant, no such problem was here presented. The Borough and School District of Shenandoah were adjoining landowners, and the protection they sought was from the negligent removal of lateral support in the mining operations under supervision of defendant.

The question of the applicability of the Kohler Act to the facts of the instant case was raised in the court below in the Borough case by plaintiff's fourth point for charge which read as follows (R. 636a):

> "IV. If you conclude that the subsidence was caused by the removal of pillars in the Kehley Run Mine in the vicinity of plaintiff's property, then defendant's conduct was unlawful and, as a consequence thereof, defendant was negligent under the provisions of the Act of May 27, 1921, P. L. 1198, 52 P.S. 661."

In the School District's case, it was raised by that plaintiff's fourth point for charge which read (R. 634a)

> "IV. If you conclude that the subsidence was caused by the removal of pillars in the Kehley Run Mine in the vicinity of plaintiff's property, then

defendant's conduct was unlawful and, as a consequence thereof, defendant was negligent, under the provisions of the Act of May 27, 1921, P. L. 1198, 52 P.S. 661."

Both points were declined by the Trial Judge and an exception noted for plaintiffs.

This brief is submitted on these exceptions.

The favorable finding of the jury established the fact that the subsidence was caused by the failure of support of the Kehley's Run Mine. The caving-in which originated in a mining operation supervised by defendant is a violation of the Kohler Act, and as such, negligence: Restatement, Torts, Section 286; *Jinks v. Currie*, 324 Pa. 532 (1936).

The verdict of the jury in favor of the Borough and School District of Shenandoah should be sustained. The Kohler Act is not intended to supersede the common law remedy of damages for negligent removal of lateral support which existed both prior and subsequent to passage of the Act. It is an aid to the common law in that it provides injunctive relief against the very set of conditions confronting plaintiffs here.

The plaintiffs have clearly established their right to a common law recovery against defendant for damages occasioned by the negligent removal of lateral support. However, in the light of the great issues of public concern that are present in this case which were not present in the *Mahon* case, supra, it is urged by the forty-one intervenors before this Court that the Kohler Act be reviewed. Its importance cannot be overemphasized both as to a control of mining practices in the future and as a legislative aid to determining liability in damages for past negligent conduct.

APPENDIX "B"

Following is a list of parties intervening in this appeal and their attorneys:

Party	*Attorney*
Blythe Township	Raymond L. Brennan
School Board of Blythe Township	Raymond L. Brennan
Butler Township	G. Harold Watkins
School Board of Butler Township	H. Franklin Kehler
Cass Township	Isadore Krasno
School Board of Cass Township	J. F. Mahoney
Coaldale Borough	B. J. Duffy
School Board of the Borough of Coaldale	B. J. Duffy
East Norwegian Township	Raymond Monahan
School Board of East Norwegian Township	Raymond Monahan
East Union Township	G. Harold Watkins
School Board of East Union Township	Frank Gallagher
School Board of Foster Township	G. Harold Watkins
Frackville Borough	John Walesky
School Board of Borough of Frackville	G. Harold Watkins
Gilberton Borough	James Bohorad
School Board of the Borough of Gilberton	G. Harold Watkins
Girardville Borough	John Lavelle
School Board of the Borough of Girardville	G. Harold Watkins

Party	*Attorney*
Kline Township	Adam D. Bavolack
School Board of Kline Township	Adam D. Bavolack
Mahanoy City Borough	James P. Bohorad
School Board of the Borough of Mahanoy City	Frank Gallagher
Mahanoy Township	James Bohorad
School Board of Mahanoy Township	James Bohorad
McAdoo Borough	John Skwier
School Board of the Borough of McAdoo	Adam D. Bavolack
School Board of the Borough of Minersville	John B. McGurl
New Philadelphia Borough	Ralph Bashore
Palo Alto Borough	Malcolm Reeves
School Board of Pine Grove Township	Charles Frank
Pottsville City	Harry Lightstone
School Board of the City of Pottsville	Malcolm Reeves
School Board of Reilly Township	Charles Frank
St. Clair Borough	Raymond Monahan
School Board of Schuylkill Township	Charles Frank
South Manheim Township	Charles Frank
Tremont Borough	Ralph Bashore
Union Township	Daniel J. Ferguson
West Mahanoy Township	Frank Gallagher
School Board of West Mahanoy Township	Frank Gallagher